Supreme Court, U.S.
FILED
SEP 20 2002
OFFICE OF THE CLERK

No. 01-1819

IN THE

Supreme Court of the United States

RICK SALGADO, *et al.*,
Petitioners,

v.

MIGUEL ROSALES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
I. THIS COURT'S REVIEW IS NECESSARY TO EXTEND THE QUALIFIED IMMUNITY ANALYSIS OF *KATZ V. SAUCIER* TO CASES INVOLVING DEADLY FORCE	3
II. REVIEW IS WARRANTED TO DISPEL THE NINTH CIRCUIT'S MISTAKEN VIEW THAT A POLICE OFFICER'S SUBJECTIVE BELIEFS CAN DEPRIVE HIM OF QUALIFIED IMMUNITY	4
III. REVIEW IS NEEDED TO ELIMINATE FROM NINTH CIRCUIT JURISPRUDENCE THE NOTION THAT REASONABLE DISAGREEMENTS AMONG POLICE PRECLUDE QUALIFIED IMMUNITY—SUCH DISAGREEMENTS *COMPEL THE GRANTING* OF QUALIFIED IMMUNITY	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Creighton,, 483 U.S. 635 (1987) 6
Crawford-El v. Britton, 523 U.S. 574 (1998) 6
Graham v. Connor, 490 U.S. 386 (1989) 6
Hunter v., Bryant, 502 U.S. 224 (1991)..... 5, 7, 8
Malley v. Briggs, 475 U.S. 335 (1986) 7, 8
Saucier v. Katz, 533 U.S. 194 (2001) 3, 7, 8
Tennessee v. Garner, 471 U.S. 1, 11-12 (1985) 3, 4, 7
United States v. Robinson, 414 U.S. 218 (1973) ... 6
Whren v. United States, 517 U.S. 806 (1996)..... 6

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REPLY BRIEF FOR PETITIONERS

The brief in opposition filed by respondent Rosales is long on factual rhetoric but contains no effective response to petitioners' compelling showing that certiorari is warranted in this case. When police shoot an armed suspect running from the scene of a midnight gun battle, qualified immunity shields such officers from personal liability regardless of whether the suspect is classified as fleeing the scene, pursuing others, or aimlessly jogging past police. Before exploring the legal arguments advanced by respondent, his submission of facts is worth examining.

First, respondent's effort to cast the two officers as "ambushing" a helpless young man is misleading. Running or even jogging from a gun battle is suspicious behavior at best and incriminating at worst. Respondent claims there was "no evidence that [police] perceived Respondent to be 'in apparent pursuit of another,'" but Petitioners wonder how else they could plausibly characterize respondent's midnight flight from a shooting scene. Respondent's mere possession of a firearm in the moments after 5-6 gunshots are seen and heard by police make him suspect number one; his position ahead of two unarmed youths racing behind him logically makes them his "companions," for who but friends/ companions would tag along with such a man? And one can logically characterize respondent as "fleeing" without a direct admission by him as to his foot speed or intent.[1]

Second, respondent admits hearing the verbal warning to "Stop! Phoenix Police!" but claims he had no time to react before he was struck by bullets. Petitioners acknowledge that deference must be given to this testimony, but two points are important to consider: (1) it is undisputed that the two companions trailing respondent immediately "reacted" to the warning by diving to the ground while respondent did not; and (2) the law governing police shootings does not demand

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[1]Ironically, we do have such an admission in this case by respondent, who testified at his deposition that he recognized the occupants of the white van involved in the drive-by shooting outside his mother's house as gang members, retrieved his gun despite the fact that possession of it would put him in violation of the conditions of his probation, and was intent on chasing and capturing the one van passenger (who had foolishly stepped out of the van and was left behind) because he was "very angry." He also confessed during his deposition that he had no plans to stop when commanded by police because he knew he would be arrested for carrying a firearm while on probation. This testimony was unknown to the two officers at they time they shot respondent, yet it highlights the ludicrous nature of respondent chastizing police for not producing "evidence" that they knew he was "fleeing" and in "apparent pursuit of another."

that warnings be given in all circumstances. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (deadly force permissible where officer has probable cause to believe suspect poses a threat of serious harm to others and if, where feasible, some warning has been given).

Finally, respondent continues to advance the theory embraced by the lower courts—that there exists no evidence that respondent posed a general or specific threat to the community and, regardless, these two officers did not personally consider him to be fleeing and further opined that running through the streets of Phoenix, Arizona, with a visible gun is not a crime. As demonstrated below, gun-carrying by itself may not constitute a crime in Arizona (depending on the legal status of the person carrying the gun), but armed flight from a gun-battle most certainly does give police grounds to stop the suspect and protect the public from potential harm.

I. THIS COURT'S REVIEW IS NECESSARY TO EXTEND THE QUALIFIED IMMUNITY ANALYSIS OF *KATZ v. SAUCIER* TO CASES INVOLVING DEADLY FORCE.

Respondent's brief, after taking note of the three arguments cited by Petitioners to support review, completely ignores sections I and III of the Petition, choosing instead to frame the debate as whether *Garner* and *Saucier v. Katz*, 533 U.S. 194 (2001) were correctly applied (and thus trying to spin this into a factual contest). As a consequence, respondent apparently concedes the (fairly obvious) point that *Katz*'s qualified immunity analysis must be extended to deadly force cases under *Garner*, yet makes no effort to defend the Ninth Circuit's confused holding here that the "unreasonableness" of the officers' belief that the shooting was constitutionally justified similarly compelled the denial of qualified immunity. Losing the *Garner* deadly force question does not automatically spell defeat for an officer's qualified immunity

defense, yet that is essentially what the Ninth Circuit concluded. Review is needed to emphatically confirm that an officer's violation of *Garner*'s Fourth Amendment test does not preclude him from receiving qualified immunity.

II. REVIEW IS WARRANTED TO DISPEL THE NINTH CIRCUIT'S MISTAKEN VIEW THAT A POLICE OFFICER'S SUBJECTIVE BELIEFS CAN DEPRIVE HIM OF QUALIFIED IMMUNITY.

Without knowing it, this section of the Petition is the only one respondent's brief makes any serious attempt at addressing. After rehearsing general deadly force law under the Fourth Amendment, respondent complains of a lack of "evidence" that he could be viewed as a "fleeing felon, a suspect of anything or that any other person was in potential danger at that moment in time." (Brief in Opposition at 5) Citing to Ninth Circuit law, respondent further claims that even if he was perceived as potentially dangerous, police were not free to gun him down.

Summary judgment may require some deference to the non-movant's version of the facts, but it is no substitute for common sense and does not hamstring police into taking the most benign and imaginative views of the armed persons they encounter. For instance, respondent opens his brief by pointing out that these two officers "did not know that the gunfire they heard came from a drive-by shooting as opposed to being, for example, random or celebratory, or whether it was gang-related, or that it was directed at a party taking place in a parking lot outside the home of Respondent's mother." (Brief in Opposition at 2) This rumination, while amusing, makes Petitioners wonder if respondent has forgotten that this civil action is not about his own guilt or innocence but whether police "could reasonably believe" his conduct posed a serious threat to others justifying the use of

deadly force. Gunshots at midnight in a gang-infested neighborhood are more than enough to make police extremely nervous about their own safety and the safety of others; when spotting a person running from such a scene while carrying a gun with two companions behind him, police are certainly justified in suspecting (or can mistakenly assume) imminent danger if the flight is allowed to continue.

The more salient debate concerns the Ninth Circuit's treatment of the subjective beliefs of the officers in failing to consider respondent to be a fleeing felon. Respondent defends the Ninth Circuit's approach by contending that police "should not be able to avail themselves of a qualified immunity defense by cherry-picking the facts." (Brief in Opposition at 6). Petitioners vehemently disagree, as summary judgment standards under Rule 56 leave them with no choice but to "cherry-pick" the facts or, stated differently, to accept the non-movant's factual version, ignore their own "stated reason for shooting," and then seek qualified immunity on the basis that even the factual fantasy created by the non-movant involves constitutionally forgiveable conduct protected by qualified immunity. Had the secret service in *Hunter v. Bryant*, 502 U.S. 224 (1991) subjectively dismissed the threats in the letters addressed to then-President Reagan as non-credible but arrested the suspect anyway for different, malicious reasons, surely the courts would still be required to "cherry-pick" the facts and inquire into whether an objectively reasonable officer "could have believed" the arrest to be constitutional.

That Phoenix police testified to shooting in self-defense does not disqualify them from receiving qualified immunity at the summary judgment stage simply because respondent's testimony (that he never turned and aimed his gun at the officers) removed the factual underpinnings of self-defense. Instead, the doctrine of qualified immunity requires the actions of the officers to be viewed, by reviewing judges,

through the lens of hypothetical, objective officers who are free to examine alternative grounds for the use of deadly force. In both qualified immunity and Fourth Amendment cases, this Court has frequently stressed the irrelevance of the officer's subjective intent or motivation, yet both respondent and the Ninth Circuit succeeded in binding the officers with their subjective intent or motivation. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Whren v. United States*, 517 U.S. 806 (1996); and *Graham*, 490 U.S. at 397.

As stated in the Petition, if an objective risk of danger would be apparent to the reasonable officer examining the facts, it is quite irrelevant that the officer involved in the shooting subjectively discounts such a risk. *See United States v. Robinson*, 414 U.S. 218, 236 (1973) ([I]t is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed."). Whether one calls it "cherry-picking" the facts or simply examining the facts (the non-movant's credible version) from the viewpoint of an objective officer, review is warranted to extend the irrelevance of an officer's subjective intent or motivation to his assessment of the danger he faces.

III. REVIEW IS NEEDED TO ELIMINATE FROM NINTH CIRCUIT JURISPRUDENCE THE NOTION THAT REASONABLE DISAGREEMENTS AMONG POLICE PRECLUDE QUALIFIED IMMUNITY—SUCH DISAGREEMENTS *COMPEL THE GRANTING* OF QUALIFIED IMMUNITY.

While largely ignoring this third argument in support of review, respondent does conclude his brief by proclaiming that "[n]o reasonable officer could ever conclude that shooting an individual, suspected of nothing, in the back without warning under the circumstances here presented 'was

within the bounds of appropriate police responses.'" Brief in Opposition at 9, citing *Katz*, 533 U.S. at 201. Three dissenting Supreme Court justices reached this very conclusion in *Garner*, ruling that a Tennessee statute authorizing the use of deadly force against an *unarmed, non-dangerous* teenage boy (who was jumping a fence after a suspected home burglary) was constitutional. But that is not the point, because qualified immunity is the issue here and it is the perspective of police officers that must be considered.

Omitted from respondent's proclamation is any mention of the three most important, undisputed facts of this case: (1) the recent drive-by shooting that alerted police to a dangerous situation; (2) respondent's running from the shooting scene while carrying a gun; and (3) the immediate reaction of respondent's two companions in dropping to the ground when commanded by police. When viewed against these facts, it is clear that some reasonable officers might condemn the decision to shoot while other reasonable officers might countenance it as necessary to avoid serious harm to others if respondent were left free to continue his armed flight. The mere fact that reasonable officers "could disagree" about the constitutional legality of the shooting compels the granting of qualified immunity in favor of Petitioners. *See Katz*, 533 U.S. at 201 ("a reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene...was within the bounds of appropriate police responses."); *Hunter* 502 U.S. at 228 (qualified immunity inquiry is whether "a reasonable officer could have believed that probable cause existed to arrest" the suspect, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact."); and *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.")

Unless *Katz*, *Hunter*, and *Malley* are no longer viable precedent or inapplicable in deadly force cases, review is necessary to reconcile Ninth Circuit law. Alternatively, this case should be remanded to the Ninth Circuit for reconsideration in light of such precedent.

CONCLUSION

For all the reasons set forth above in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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